SHANKAR RP ASNANI

v.

STANLEY EDDY

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[ORIGINATING SUMMONS NO: KG 24-422-03-II]
11 MARCH 2004

LEGAL PROFESSION: *Practice and etiquette - Conduct of advocates and solicitors - Prayer to prohibit advocate from appearing for another advocate - Whether there existed conflict of interest - Acceptance of brief thereof - Whether would cause embarrassment - Whether to be disqualified - Advocates (Practice and Etiquette) Rules 1988 (Sarawak), r. 3(1), (2)(b) - Legal Profession (Practice and Etiquette) Rules 1978, r. 3(a), (b)(ii)*

This was a preliminary objection by the plaintiff against one Mr. Sim Hui Chuang or any other advocate from Messrs Reddi & Co appearing on behalf of the defendant in respect of an originating summons instituted by the plaintiff against the defendant. The plaintiff submitted that there had been a breach of r. 3(1) and (2)(b) of the Advocates (Practice and Etiquette) Rules 1988 (Sarawak) (substantially *in pari materia* with r. 3(a) and (b)(ii) of the Legal Profession (Practice and Etiquette) Rules 1978) because: (i) Mr. Sim appeared on behalf of the Advocates Association of Sarawak ('the Association') to oppose a petition for the *ad hoc* admission of one Dato' Muhammad Shafee as senior counsel for Kumpulan Liziz Sdn Bhd ('the petition'); and (ii) Mr. Sim was an office bearer of the Association of which the defendant was the secretary.

Held (allowing the preliminary objection in part):

[1] Based on the evidence adduced, there was no dispute that Mr. Sim had opposed the petition and that he was on record as representing the Association, a registered entity under the Societies Act 1966. Mr. Sim and the defendant were the vice-president and secretary of the Association respectively, and the defendant was also retained by Kumpulan Liziz Sdn Bhd. Hence, by virtue of such a close association, and following the case of *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram*, the objection raised by the plaintiff was not unfounded as Mr. Sim had, or appeared to have, a conflict of interest such that justice would not be seen to be done. (p 609 a-c)

[1a] However, this court could not agree with the plaintiff's contention that any other advocate from the firm of Messrs Reddi & Co should also be disqualified from appearing on behalf of the defendant in respect of the plaintiff's application since there was no nexus or conflict of interest that existed between any other advocate from Messrs Reddi & Co and the defendant, bearing in mind that Mr. Sim Hui Chuang, although from Messrs Reddi & Co, was representing the Association in the application for an *ad hoc* licence to appear in the Miri High Court suit, the suit out of which the plaintiff's application emanated. (p 609 d-f)

[Plaintiff's preliminary objection allowed in part.]

Case(s) referred to:
Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors [2003] 7 CLJ 11 ***(refd)***
Mohtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 CA ***(refd)***
Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC ***(dist)***
Poh Kwong Development Sdn Bhd v. Peninjau Enterprise Sdn Bhd (Summon No: AE/KG 2 of 1984) (Unreported) ***(dist)***
UMBC v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram [2000] 4 CLJ 870 CA ***(foll)***

Legislation referred to:
Advocates (Practice and Etiquette) Rules 1988, r. 3(1), (2)(b)
Legal Profession (Practice and Etiquette) Rules 1978, r. 3(a), (b)(ii)
Rules of the High Court 1980, O. 1A, O. 2 r. 3

For the plaintiff - Shankar Ram; M/s Thomas, Shankar Ram & Co
For the defendant - Sim Hui Chuang (KC Wong & Kilat Beriak); M/s Reddi & Co

Reported by Suresh Nathan

JUDGMENT

Lau Bee Lan JC:
The court has considered the submissions of the learned counsel for the defendant, namely Mr. Sim Hui Chuang (lead counsel) together with Mr. K.C. Wong and Mr. Kilat Beriak and that of the plaintiff, Mr. Shankar R.P. Asnani. The findings and evaluation of the court include:

(1) The plaintiff, Mr. Shankar R.P. Asnani, had given notice to Messrs. Reddi & Co. *vide* a letter dated 21 November 2003 (exh. SRPA17) that he will be raising a preliminary objection to Mr. Sim Hui Chuang or any other advocate from Messrs. Reddi & Co. appearing on behalf of the defendant in respect of the originating summons instituted by him against Stanley Eddy, the defendant, for, *inter alia*:

1. A declaration that the defendant acted in contravention of The Advocates (Practice & Etiquette) Rules 1988 and in particular Rules 18, 42 and 54 thereof in taking over the Miri High Court case of KUMPULAN LIZIZ SDN. BHD, for whom the Plaintiff has been acting as the sole advocate, without the knowledge/consent of the Plaintiff.

2. A declaration that the defendant Stanley Eddy is bound to compensate the Plaintiff by paying to the Plaintiff all professional fees and charges due and owing from this client the said KUMPULAN LIZIZ SDN. BHD., as between solicitors and own client.

3. An order that the defendant do pay to the Plaintiff damages suffered by the Plaintiff on account of the illegal taking over by the defendant of the conduct of the case of the said KUMPULAN LIZIZ SDN. BHD.

4. An order that the defendant do pay to the Plaintiff all fees and charges owing/owed to the Plaintiff by the said KUMPULAN LIZIZ SDN. BHD.

(hereinafter referred to as "the Plaintiff's Application")

The grounds for the objection are:

(a) Mr. Sim Hui Chuang appeared on behalf of The Advocates' Association to oppose the Petition for ad hoc admission of Dato' Muhammad Shafee Bin Abdullah – Petition No. 17-10-2003-II which was heard before the Honourable Chief Judge on 4th September 2003; and

(b) Mr. Sim Hui Chuang is an office bearer of the Advocates Association of which the Defendant Stanley Eddy is the Secretary.

(2) The defendant is objecting to the plaintiff's mode of raising the preliminary objection by way of a notice instead of taking up a summons in chambers supported by affidavits.

It appears that the defendant opposed on two grounds. First of all the authorities cited by the plaintiff in support of raising the preliminary objection in the manner which he did showed that different modes were adopted and in none of the cases cited, was the question of mode of application raised.

The other ground is that, with the advent of O. 1A and O. 2 r. 3 of the Rules of the High Court 1980 ("the RHC"), the court to quote Mr. K.C. Wong "is now directed to consider whether a non-compliance of any of the Rules of the High Court has occasioned a substantial miscarriage of justice."

(3) I agree with the statement of Mr. K.C. Wong regarding the provisions of O. 1A and O. 2 r. 3 of the RHC and in fact the case of *Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors* [2003] 7 CLJ 11, confirms that. Similarly, the cases of *UMBC v. Ernest Cheong Yong Yin* [2001] 2 CLJ 312 and *Mohtar Amin v. Mohamed Moktar Omar* [2001] 4 CLJ 489, though decided before the amendment, (O. 1A came into effect on 16 May 2002) all showed the approach of the Court of Appeal towards technical objections.

But these cases are to be distinguished as O. 1A and O. 2 r. 3 of the RHC are not applicable in this context. What the plaintiff is objecting to is that there has been a breach of the Etiquette Rules and not the RHC for which O. 1A and O. 2 r. 3 of the RHC applies.

In the present case, the plaintiff has objected to the 2 grounds namely, *inter alia*, there has been a breach of r. 3(1) and 3(2)(b) of The Advocates (Practice and Etiquette) Rules 1988 which is substantially in *pari materia* with r. 3(a) and (b)(ii) of the Legal Profession (Practice and Etiquette) Rules 1978. Rule 3(1) and 3(2)(b) of the Advocates (Practice & Etiquette) Rules 1988 ("The Practice & Etiquette Rules") provides:

> 3(1) An advocate shall not accept a brief if he is or would be embarrassed.
>
> (2) An embarrassment arises:
>
> (a) ...
>
> (b) where there is some personal relationship between him and a party or a witness in the proceedings.

As to the interpretation of r. 3(2)(b) of The Practice & Etiquette Rules, I am of the view that it is appropriate to refer to the Federal Court case of *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870. In this case, in the originating summons, the appellant had prayed that the respondent be prohibited from acting as the advocate and solicitor for her brother, sister and niece in various pending civil actions pursuant to rr. 3(a), (b)(ii) and s. 27 of the Legal Profession (Practice & Etiquette) Rules 1978.

Of pertinence to the issue at hand are the following extracts from the judgment of Abu Mansor, FCJ (delivering the judgment on behalf of the Federal Court) at p. 875, para e to g as follows:

> Reading r. 3(a) of that Practice and Etiquette Rules, *it is clear how the rules are meant to regulate the conduct of advocates and solicitors. It has been so drafted to regulate rules, and by which the members of that profession are injuncted from accepting a brief if he would thereby be embarrassed by it. The rules had defined what amounts to embarrassment*. The meaning of embarrassment is spelt out in r. 3(b)(ii) of the rules "where there is some personal relationship between him (the advocate or solicitor) and a party or a witness in the proceedings.
>
> What does come within the ambit of "personal relationship"? By its ordinary *Concise Oxford Dictionary's* meaning of relationship is "the fact or state of being related" and "personal" is relating to or connected with the person. Or to take the meaning of "relation" in the *Jowitt's Dictionary of English Law* it means "a general word meaning *prima facie* next-of-kin of any degree or colloquially, kindred of all degrees. (emphasis added)

Further, at p. 877 para b to e, his Lordship stated as follows:

> On the subject of personal relationship, learned counsel cited to us the authority of *Black v. Taylor* [1993] 3 NZLR 403, a Court of Appeal decision in New Zealand. In this case a solicitor had previously acted for several members of a family including the plaintiff and the deceased. The plaintiff brought proceedings against the estate of the deceased alleging breach of an agreement etc. The plaintiff sought an injunction to restrain the solicitor from acting as either solicitor or counsel for the estate. *The application was made on the ground of conflict of interest based on the solicitor's receipt of confidential information relevant to the issues in the proceeding.* The High Court had made a declaration that the solicitor should act further as counsel in the proceeding. The solicitor appealed and the plaintiff cross-appealed. *The Court of Appeal held the court's power to restrain a barrister from acting, arose from the court's inherent jurisdiction where the interests of justice so required. It further held that the court may prevent a barrister acting as counsel in a matter in which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done.* (emphasis added)

At p. 880 para h, his Lordship further opined:

> In this regard we would apply the decision of *Black v. Taylor* [1993] 3 NZLR 403 where the Court of Appeal in New Zealand held that "the court may prevent a barrister acting as counsel in a matter which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done.

Based on the evidence adduced *vide* the affidavits of the plaintiff (encls. 2 and 18) and affidavit of Mr. T.O. Thomas (encl. 22), there is no dispute that Mr. Sim Hui Chuang had objected to the *ad hoc* admission of Dato' Shafee as Senior Counsel for Kumpulan Liziz Sdn Bhd and Mr. Sim Hui Chuang was on record as representing the Advocates Association of Sarawak which is a recognised entity, a society registered under the Societies Act 1966. From exh. SRPA16, it is evident that Mr. Sim Hui Chuang held the post of Vice-President and Mr. Stanley Eddy held the post of Secretary. It must be borne in mind also that the defendant was retained by Kumpulan Liziz Sdn Bhd. Hence, by virtue of such a close association, and following the case of *Vijayalakshmi (supra)*, I am incline to agree that the objection raised by the plaintiff is not unfounded as indeed in respect of the plaintiff's application, "he, (Mr. Sim Hui Chuang) had a conflict of interest or in which he appeared to have a conflict of interest such that justice would not be seen to be done."

(4) However, with regret, I cannot agree with the contention that any other advocate from the firm of Messrs. Reddi & Co. should also be disqualified from appearing on behalf of the defendant in respect of the plaintiff's application. The plaintiff seeks to rely on *Paruvathy a/p Palany v. Sathiasealan a/l Govindasamy* [1999] 6 CLJ 113. This is because in *Paruvathy*'s case *(supra)*, the counsel whom the plaintiff sought to bar from representing the defendant was personally involved in the whole episode. However in the instant case, what is the nexus or conflict of interest that would exist between any other advocate from Messrs. Reddi & Co. with the defendant, bearing in mind that Mr. Sim Hui Chuang, though from Messrs. Reddi & Co., was representing the Advocates Association of Sarawak in the application for an *ad hoc* licence to appear in the Miri High Court Suit, out of which the plaintiff's application emanated.

(5) As for the case of *Poh Kwong Development Sdn Bhd v. Peninjau Enterprise Sdn Bhd* (Summon) No. AE/KG 2 of 1984), I am not bound to follow the said decision. Furthermore, it can be distinguished as submitted by the plaintiff, that unlike *Poh Kwong Development*'s case *(supra)*, where the court, on the facts of the case, *inter alia*, held "(2) even if assuming that a conflict of interest could possibly arise, it was for UMBC to raise the objection which UMBC did not do in this case", in the instant case, the plaintiff had objected strenuously.

In the circumstances, the plaintiff's preliminary objection is allowed partially with half of his costs to be taxed.